

ASWM Assumption Webinar Series Webinar 1:
Assumption 101 Outline

Welcome and Introductions – Brenda Zollitsch, ASWM Moderator

Introduction to Assumption -Kathy Hurlid, EPA Headquarters

- What is assumption?
- Why would states and tribes assume the 404 Program?
- EPA's current efforts to encourage assumption

Assumption 101 Presentation Outline for Discussion – ASWM Policy Staff or Others

- **Pose series of common questions about assumption at the beginning of webinar**
- **What is assumption?**
- **History of assumption**
 - Origins
 - Michigan
 - New Jersey
 - No additional states or tribes since
 - Reasons states/tribes have not assumed
- **What has changed since then?**
 - **Assumable waters issue has changed**
 - **EPA looking at rulemaking/encouraging**
 - **States interested for new reasons**
 - **Treatment as a state (tribal assumption)**
- **Benefits of assumption**
- **Determining stakeholder interest in assumption**
 - **Interest level**
 - **Willingness to pay (as a gamechanger)**
- **Requirements for assumption**
- **What must be provided in an assumption application?**
 - Letter from the Governor or equivalent tribal leader requesting program approval
 - Complete *program description* (see next section)
 - Statement from the Attorney General or tribal equivalent certifying that the state has legal authority to meet all federal requirements
 - MOU with the respective Regional Administrator
 - MOU with the Secretary of the Army
 - Copies of all applicable state or tribal statutes and regulations, including those governing applicable state or tribal administrative procedures.
- **A closer look at the application's program description**
 - A description of the scope and structure of the program,
 - Procedures - permitting, administrative and judicial review
 - Structure and org of state or tribal agency responsible

- Funding and staffing levels
- Anticipated workload
- Copies of permit application, permit & reporting forms;
- Compliance evaluation and enforcement programs
- Description of the waters under state jurisdiction and those under Corps jurisdiction;
- BMPs proposed to satisfy exemption provisions
- **Basic steps in assumption**
 - Step 1 - Initiate
 - Step 2 – Hold dialogue prior to assumption request
 - Step 3 – Develop and submit assumption package
 - Step 4 – EPA review and approval
- **Two Specific Considerations:**
 - What are “assumable waters?”
 - What is a “Federal Consistency Analysis”
 - What about the ESA?
 - Replacing federal 106 reviews with state authority
- **What’s happening with assumption now?**
 - EPA intends to “modernize” 404(g) regulations to assist the authorized states and tribes in assuming this authority.
 - EPA is currently engaged in the § 404(g) rulemaking process.

Presentation by Assumed State:

Michigan’s Program (Assumed 1984) – Ann Garwood and Amy Lounds, MI DEQ

- What have they gained from assuming the programs
- What are some challenges they have faced
- Lessons learned (big picture; specific will be in later webinars by topic)

Presentation by Assumed State:

New Jersey’s Program (Assumed 1994) – Susan Lockwood/Jill Aspinwall. NJDEP?

- What have they gained from assuming the programs
- What are some challenges they have faced
- Lessons learned (big picture; specific will be in later webinars by topic)

Q&A Session

Concluding Remarks – Brenda Zollitsch, ASWM Moderator

- How to participate in national dialogues
- Additional resources
- Upcoming webinars
- Wrap-up

Assumption 101 Presentation Outline for Discussion Proposed Content

Pose list of questions at the beginning of webinar:

- Why would my state or tribe consider assumption?
- Do we have the political support to develop and maintain an assumed program?
- How will the state/tribe/citizens/development community benefit?
- What are reasons others have chosen not to assume?
- Do we have the authority to assume?
- How will we cover the enforcement responsibilities?
- What are the steps in assuming?
- What do I need to do in preparation for submitting an application?
- What is our likelihood of being approved to assume?

What is assumption?

- “Assumption” of the CWA Section 404 program describes the process whereby a state or tribe obtains approval from the EPA to administer the 404 program within their borders and consequently begins administering the program.
- To obtain EPA approval, the state or tribal program must be consistent with and no less stringent than that required by law of the federal agencies.
- For example, a state or tribe must:
 - o have sufficient authority to regulate all waters of the US that may be assumed;
 - o regulate at least the same activities as listed in the Act and regulations;
 - o provide for sufficient public participation;
 - o ensure compliance with the Section 404(b)(1) guidelines, which provide environmental criteria for permit decisions;
 - o have adequate enforcement authority; and
 - o comply with other applicable regulations (33 USC part 1344(h); 40 CFR part 233)
- Assumption by a state or tribe does not alter CWA jurisdiction over waters of the United States.
- The waters and wetlands that a state may not assume, and that the USACE must retain even after a state has assumed the program, are specified in a parenthetical phrase in section 404(g)(1) as:
 - o *“... those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, or mean higher high water mark on the west coast, including wetlands adjacent thereto ...”*
- In accordance with the requirements of Section 404, a state or tribe may only be authorized to assume the Section 404 Program if it has authority over all assumable waters of the United States, and demonstrates that it will apply legal standards consistent with the Clean Water Act (CWA) requirements in operating a permitting program.

- In an assumed 404 program, the EPA retains the authority to review defined categories of permit applications and may request review of any application. The EPA coordinates its review of a particular application with the USACE and requests comments from the US Fish and Wildlife Service, and, as appropriate, the National Marine Fisheries Service, with the EPA providing comments to the state or tribe.
- In the event that the EPA objects to issuance of a 404 permit, the state or tribe cannot issue the 404 permit unless the EPA's objection is resolved.
- States and tribes assume permitting authority over certain waters, but others are retained under the authority of the Corps.
- Assumption does not reduce the scope of Clean Water Act jurisdiction, but instead shifts responsibility for administering the Section 404 permitting program for certain waters of the United States from the federal government to authorized states or tribes.
- The Clean Water Act provides that the Corps retains permitting authority in certain tidal waters and other specified waters currently related to the transport of interstate or foreign commerce.
- For those states or tribes with mature, integrated water management programs that include the regulation of dredged or fill activities, 404 Program assumption allows a state or tribe to carry out a fully integrated and comprehensive water program addressing the full range of state, tribal, and CWA requirements. Despite the complexity of the program and potential administrative costs, states and tribes remain interested in pursuing assumption

History of assumption

- Section 404 of the Clean Water Act (CWA) authorizes the US Army Corps of Engineers (USACE) to issue permits for discharge of dredged or fill material in navigable waters.
- "Navigable waters" is defined under the CWA to mean "the waters of the United States and territorial seas."
- Section 404(g) of the CWA authorizes states,¹ with approval from the US Environmental Protection Agency (EPA), to assume authority to administer the 404 program in some, but not all, navigable waters and adjacent wetlands.
- Section 404(g)(1) describes the waters over which the USACE must retain administrative authority even after program assumption by a state or tribe.
- Since Section 404(g) was enacted in 1977, two states have assumed the program: Michigan and New Jersey.
- Michigan and EPA signed a MOA regarding assumption in 1983. In 1984, the state and the USACE signed a MOA describing waters over which the USACE retained administration.
 - o Prior to assumption, Michigan had enacted a number of statutes related to water protection, including the 1955 Great Lakes Submerged Lands Act, the 1972 6
 - o In 1980, the EPA produced a document entitled: "The State's Choice: 404 Permit Program" that provides some insight into the agency's thinking at that time (US EPA, Office of Water Regulations and Standards Criteria and Standards Division, EPA 440/5-81-002, October 1980).
 - o The EPA's implementing regulations also provide very general guidance. These regulations state that the MOA between the USACE and state or tribe will contain "A

description of waters of the United States within the State over which the Secretary retains jurisdiction, as identified by the Secretary.”

- The Wetland Protection Act was passed to facilitate assumption of the 404 Program. In 1984, EPA formally approved Michigan’s program.
- New Jersey assumed the program in 1994
 - Prior to assumption, New Jersey passed its Wetlands Act in 1970, Coastal Zone Management Act in 1972, and the Freshwater Wetlands Protection Act in 1987.
 - As part of the Freshwater Wetlands Protection Act, New Jersey undertook a mapping program to identify freshwater wetlands and waters.
 - While the maps are not regulatory in nature, New Jersey’s 404 program is keyed to these freshwater wetlands maps
 - As an assumed program, the state of New Jersey
 - reviews all incoming wetlands/waters permit applications regardless of whether they are in assumed or non-assumed waters.
 - conducts jurisdictional determinations throughout most of the state.
 - prescreens incoming permit applications to identify projects constituting “major discharges,” which are then sent to the EPA for Federal review
 - Coordinates with municipalities around federally-listed threatened or endangered species with the FWS.
 - coordinate required mitigation
 - reviews and approves mitigation banks independently in assumed area conducts compliance and enforcement for violations in non-assumed waters.
 - The state cannot approve a Section 404 permit over the EPA objections.
 - In those cases where a project is in a non-assumed water, the state issues its state permit independently of the USACE.
 - Over the years, the state has made between 550 and 2,000 permit decisions annually.
 - In addition, the state’s Enforcement Bureau has undertaken an average of 1,000 actions annually on reports of noncompliance.
- The legislative history and statute indicate that Congress intended and expected that a number of states would choose to assume authority over the discharge of dredged or fill materials under the provisions of Section 404(g).
- However, no states or tribes have assumed the 404 Program since Michigan and New Jersey.
- There are many possible reasons for this:
 - increasing complexity of administering the program and meeting program requirements,
 - Lack of dedicated federal funding dedicated to administer assumed programs (WPDGs can only be used for development, not implementation of state/tribal wetland programs);
 - Unlike several other EPA programs, Congress did not dedicate specific additional funding for states or tribes to cover the costs of administering a 404 program.
 - Decades-long challenges about which waters should even be regulated under Section 404,

- Until recently, EPA and the USACE had not provided specific guidance that can be used to identify the waters (and wetlands) that must be retained by the USACE under 404(g).
 - Without specific guidance, individual states or tribes and USACE districts were left to interpret the meaning of 404(g)(1) to determine the extent of waters to be retained in each MOA negotiation.
 - In turn, these negotiations often broke down or stopped due to lack of clarity, uncertainty, or disagreement over the scope of retained waters and wetlands.
- Inability to assume administration of Section 10 waters of the River and Harbors Act and wetlands adjacent to those waters, as well as tidal wetlands in some coastal states
- Need for alternative coordination with other federal program
- No option for partial assumption currently
- **What has changed since then?**
 - **Assumable waters issue has changed**
 - **EPA looking at rulemaking/encouraging**
 - **States interested for new reasons**
 - **Treatment as a state (tribal assumption)**

Benefits of assumption

- Improved resource protection: State and tribal regulators are generally more familiar than the with local aquatic resources, issues, and needs
- Use of state-specific resource policies and procedures
- Increased program efficiency:
 - An efficient state- or tribal-run program can help reduce delays and save money for permit applicants.
 - Under an assumed program, Section 404 permit applicants may need only a single state or tribal permit for dredged or fill material discharges
 - For states with dredge and fill programs separate from the federal program, assuming the Section 404 program allows states and tribes to streamline the review process and reduce unnecessary paperwork and duplication.
- Effective allocation of federal and state/tribal agency resources
- Improved integration with other state resource programs:
 - States and tribes can also integrate dredged and fill permitting with traditional water quality programs, such as monitoring and water quality standards, or state/tribal land use planning requirements.
 - It may also reduce the potential for conflict between federal and state or tribal decisions or permitting conditions.
- Increased regulatory program stability
- Increased public support
- **Determining stakeholder interest in assumption**
 - **Interest level**

- **Willingness to pay (as a gamechanger)**

Requirements for assumption

- State must have jurisdiction over all waters
- State must regulate at least the same activities as federal
- State laws must ensure compliance
- State must have adequate enforcement authority
- Currently not possible to assume a portion of the program (under review by EPA)
- The assumed program must include, but is not limited to, the following provisions:
 - Permitting procedures
 - Administrative and judicial review procedures
 - Regulating discharges into all assumed waters within the state or tribe's jurisdiction
 - Regulation of at least the same scope of activities as the Section 404 program
 - Public participation
 - Meeting public notice requirements
 - Permit issuance consistent with the environmental review criteria known as the [[HYPERLINK "https://www.epa.gov/cwa-404/section-404b1-guidelines-40-cfr-230"](https://www.epa.gov/cwa-404/section-404b1-guidelines-40-cfr-230)]
 - Compliance and enforcement authorities as specified in the regulations; an
 - Coordination procedures with federal agencies, adjacent states and tribes.
 - *Draw on complete list of program requirements please see the regulations at [[HYPERLINK "https://www.epa.gov/cwa-404/40-cfr-part-233-404-state-program-regulations"](https://www.epa.gov/cwa-404/40-cfr-part-233-404-state-program-regulations)]*

Authority for assumed program

- Role of EPA (oversight) – intended to now be a partnership
- Development of an MOU between the EPA and tribe
- Types of permits where EPA more involved in review of projects (critical wetland areas, listed species, etc.)

What must be provided in an assumption application?

- Letter from the Governor or equivalent tribal leader requesting program approval
- Complete ***program description*** (see next section)
- Statement from the Attorney General or tribal equivalent certifying that the state has legal authority to meet all federal requirements
- a Memorandum of Agreement with the respective Regional Administrator
- Memorandum of Agreement with the Secretary of the Army
- Copies of all applicable state or tribal statutes and regulations, including those governing applicable state or tribal administrative procedures.

What needs to be in the application's program description?

- A description of the scope and structure of the program, including jurisdiction, activities regulated, anticipated coordination, permit review criteria, and scope of permit exemptions, if any;

- Procedures for permitting, administrative review and judicial review;
- Structure and organization of state or tribal agency responsible for program administration;
- Funding and staffing levels;
- Anticipated workload;
- Copies of permit application forms, permit forms, and reporting forms;
- Compliance evaluation and enforcement programs;
- Description of the waters under state jurisdiction and those under the U.S. Army Corps of Engineers (Corps) jurisdiction; and
- Best Management Practices proposed to satisfy farm, forest, and temporary mining roads exemption provisions.

Basic steps in assumption

- Step 1 - **Initiate** - Contact applicable [[HYPERLINK "https://www.epa.gov/aboutepa/current-epa-leadership"](https://www.epa.gov/aboutepa/current-epa-leadership)] and [[HYPERLINK "https://www.epa.gov/cwa404g/us-interactive-map-state-and-tribal-assumption-under-cwa-section-404"](https://www.epa.gov/cwa404g/us-interactive-map-state-and-tribal-assumption-under-cwa-section-404)] to identify interest in assumption.
 - Step 2 – **Hold Dialogue prior to Assumption Request** - Confer with EPA regional and headquarters staff on pre-request steps, process, and substantive requirements; review existing state or tribal programs, laws, and resources and identify program modifications and/or legislation needs; conduct outreach with the public and regulated community; and obtain feedback from U.S. Army Corps of Engineers (Corps) on waters the Corps will retain.
 - Step 3 – [[HYPERLINK "https://www.epa.gov/cwa404g/assumption-request-package-under-cwa-section-404"](https://www.epa.gov/cwa404g/assumption-request-package-under-cwa-section-404)]
- Step 4 – [[HYPERLINK "https://www.epa.gov/cwa404g/assumption-request-approval-process-under-cwa-section-404"](https://www.epa.gov/cwa404g/assumption-request-approval-process-under-cwa-section-404)] – EPA reviews request package; publishes a notice of the request for public comment; conducts federal agency review; holds a public hearing; and documents its review and decision. Once the package is complete, the package goes through a 120-day review process, as specified in 40 CFR 233.15.
- States or tribes should work with their respective EPA Regional Office “early and often” during the preparation of the Section 404 assumption package to ensure it is complete.

Two Specific Considerations:

What are “assumable waters?”

Refer to the [[HYPERLINK](https://www.army.mil/article/209359/army_issues_memorandum_to_empower_states_tribes_in_their_permitting_authority)

["https://www.army.mil/article/209359/army_issues_memorandum_to_empower_states_tribes_in_their_permitting_authority"](https://www.army.mil/article/209359/army_issues_memorandum_to_empower_states_tribes_in_their_permitting_authority)] regarding how the Corps is to identify waters to be retained.

What is a “Federal Consistency Analysis”

What about the ESA?

Replacing federal 106 reviews with state authority

What's happening with assumption now?

- In the [[HYPERLINK "https://www.reginfo.gov/public/Forward?SearchTarget=Agenda&textfield=404%28g%29"](https://www.reginfo.gov/public/Forward?SearchTarget=Agenda&textfield=404%28g%29)], EPA published the Agency's plan for the first comprehensive revision to the existing Section 404(g) regulations since 1988.
- Working to create greater clarity on the requirements for state and tribal assumption of the Section 404 permitting program (identified as one of EPA's priorities)
- EPA intends to "modernize" 404(g) regulations to assist the authorized states and tribes in assuming this authority.
- EPA is currently engaged in the 404(g) rulemaking process.
- EPA will continue to update its assumption rulemaking page as the process develops, including announcing any opportunities for public engagement. There is currently no open public comment period. ([[HYPERLINK "https://www.epa.gov/cwa404g/current-efforts-regarding-assumption-under-cwa-section-404"](https://www.epa.gov/cwa404g/current-efforts-regarding-assumption-under-cwa-section-404)])

I'm Interested, now what? --- Where to look for more information

- EPA Website
- ASWM Assumption Handbook
- ASWM Assumption Project National Dialogues
- ASWM Assumption Project Webinar Series
- States and tribes can apply for [[HYPERLINK "https://www.epa.gov/wetlands/wetland-program-development-grants-and-epa-wetlands-grant-coordinators"](https://www.epa.gov/wetlands/wetland-program-development-grants-and-epa-wetlands-grant-coordinators)] to develop programs and pursue assumption. Wetland Program Development Grants provide eligible applicants an opportunity to conduct projects that promote the coordination and acceleration of research, investigations, experiments, training, demonstrations, surveys and studies relating to the causes, effects, extent, prevention, reduction and elimination of water pollution.
- ASWM forthcoming web resource(s)
 - o Links to state examples
 - o Templates and forms
 - o Links to external resources
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